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In The
Supreme Court of the United States

SOLOMON AND SOLOMON, P.C.,
JULIE S. FARINA AND DOUGLAS FISHER,

Petitioners,

v.

JANET ELLIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI OF SOLOMON AND SOLOMON, P.C., JULIE S. FARINA AND DOUGLAS FISHER

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QUESTIONS PRESENTED

1. In the absence of a dispute from the debtor, does the initiation of a lawsuit to collect on an account within the thirty day dispute period under 15 U.S.C. § 1692g violate the debtor's rights to dispute the debt under such section?

2. Whether it was proper under the FDCPA for the Second Circuit to require a party commencing a lawsuit in the dispute period to include additional, unspecified explanatory language describing the relationship between 15 U.S.C. § 1692g and the deadlines in the state court lawsuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, petitioner Solomon and Solomon, P.C., a corporation, states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

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The decision of the Second Circuit Court of Appeals in *Ellis v. Solomon and Solomon, P.C., et al.*, is officially reported at 591 F.3d 130 (2d Cir. 2010), and reprinted in the Appendix ("App.") 1-15. The decision of the District Court is reported at 599 F. Supp.2d 298 (D. Conn. 2009), and reprinted at App. 16-33.

JURISDICTION

The Court of Appeals filed its decision in this case on January 13, 2010. No petition for rehearing was filed.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1), which states, in pertinent part, "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case. . . ." *Id.*

STATUTES INVOLVED

This case involves provisions of the Fair Debt Collection Practices Act ("FDCPA"), namely 15 U.S.C. § 1692(e) and 15 U.S.C. § 1692g.

Section 1692(e) sets forth the purpose of the FDCPA:

> It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e).

Section 1692g lists specific disclosures that collectors must communicate to consumers in or after an initial communication. The version of section 1692g that was in effect in 2005, at the time the events in the case at bar occurred, reads:

> 15 U.S.C. § 1692g. Validation of debts
>
> (a) Notice of debt; contents
>
> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion

thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of the judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

15 U.S.C. § 1692g (2005).

STATEMENT OF THE CASE

Facts

This case concerns the fundamental right to commence a lawsuit and the Second Circuit's unprecedented interpretation of the Fair Debt Collection Practices Act ("FDCPA" or "the Act") in which it concluded that a collection attorney, who has admittedly given the thirty day notice required by 15 U.S.C. § 1692g of the Act, cannot initiate a lawsuit within that dispute period without "overshadowing" the notice unless the lawsuit is served along with a further explanatory notice. The Act includes no such requirement and courts, all but the Second Circuit, which have considered the issue decided in this case, have found no such requirement.

Respondent Janet Ellis ("Ellis") was a credit card holder of a card account issued by Citibank. Respondent had defaulted on her account with a balance in excess of $17,000.

Citibank, after its own unsuccessful efforts to collect on the account, referred the account to the law firm of Solomon and Solomon, P.C. ("Solomon") for the

purpose of initiating a suit on the delinquent account. Solomon wrote Ellis an initial letter on May 13, 2005, in a manner permitted under the FDCPA, containing a clear disclosure of the debtor's rights under the FDCPA to dispute the debt within thirty days of receipt of the letter or, within the same period, request verification of the debt or the name of the original creditor, if different from the current creditor.

As requested by its client, Solomon prepared the papers required to commence a lawsuit in the Connecticut Superior Court. Those papers were served upon the debtor on May 31, 2005. The summons and complaint were not accompanied by a notice explaining the relationship between the lawsuit and the May 13 letter because the plain language of the FDCPA includes no such requirement and the two items contained no inconsistency requiring explanation.

The summons and complaint identified a return date of July 19, 2005, more than a month after the expiration of the thirty day dispute period under § 1692g of the FDCPA. App. 34-35. According to the instructions found in the summons, App. 49-50, and under Connecticut law, the debtor was not required to respond in any way to the lawsuit until, at the earliest, two days after the return date – July 21, 2005. In fact, the instructions explained that the only response that would have been required on July 21, 2005 would have been a notice of appearance. App. 49-50. At no time prior to service of the lawsuit had the debtor, or anyone acting on her behalf, conveyed any dispute to Solomon concerning the underlying debt.

In the Proceedings Below

The debtor commenced an action against the Petitioners in the District Court for the District of Connecticut claiming, *inter alia*, that the suit initiated by Solomon violated her rights to dispute or seek verification of the debt under 15 U.S.C. § 1692g.

On cross motions for summary judgment, the District Court held that the commencement of litigation before the end of the dispute period overshadowed the debtor's dispute rights under 15 U.S.C. § 1692g. The Court further held that the law firm was required to include with the court papers an explanation, not otherwise required by the FDCPA, indicating that the commencement of litigation did not detract from the debtor's dispute rights.

On appeal, the Court of Appeals affirmed even though the Connecticut Superior Court summons and complaint at issue did not contain any actual contradiction with the consumer's dispute rights. The decision is contrary to authority from the Court of Appeals for the Sixth Circuit, other District Court decisions in the Third and Seventh Circuits and a formal advisory opinion from the Federal Trade Commission ("FTC").

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SECOND CIRCUIT'S CONFLICT WITH ALL OTHER AUTHORITY, INCLUDING REPORTED DECISIONS FROM THE SIXTH CIRCUIT COURT OF APPEALS, DISTRICT COURTS IN THE THIRD AND SEVENTH CIRCUITS AND A FORMAL FEDERAL TRADE COMMISSION ADVISORY LETTER.

Petitioner attorneys – two individual attorneys and the law firm in which they practice – have had judgment rendered against them and monetary damages imposed, including $1,000 in statutory damages and $51,759.00 in attorneys fees, for initiating a debt collection action against Respondent. This $52,759.00 penalty was imposed as a result of Petitioners utilizing a process which other courts considering the issue and the government agency regulating debt collection have approved. Because the Second Circuit's opinion, without supporting authority, is in conflict with the Court of Appeals for the Sixth Circuit as well as district courts in the Seventh and Third Circuits and a formal advisory opinion of the FTC, this Court should issue its writ of certiorari to resolve an issue which has an impact on creditors' fundamental right to access the courts which enables consumers to use the FDCPA not as a shield against improper practices, but as a sword against legitimate debt collection.

The genesis of this action is the commencement of litigation over a delinquent credit card account. Without supporting precedent, the Court of Appeals

for the Second Circuit held that the mere commencement of a civil action to collect a credit card debt subsequent to sending a notice of dispute rights, but during the thirty day dispute period, overshadowed that notice, even though the consumer had not disputed the debt, the civil action did not require any response during the thirty day period and the lawsuit did not otherwise shorten that period. The Second Circuit also held that the collection lawyers were required to make an additional disclosure, not otherwise required by the FDCPA, explaining that the civil action did not affect the consumer's rights disclosed under 15 U.S.C. § 1692g. The Second Circuit's opinion did not mention, let alone discuss *Federal Home Loan Mortgage Corporation v. Lamar*, 503 F.3d 504 (6th Cir. 2007), the only reported appellate opinion that had considered the issue that was before the Second Circuit and held to the contrary.

The ruling of the Second Circuit Court of Appeals in this matter stands in contradiction to the Sixth Circuit's *Lamar* decision, two additional reported district court opinions from the Third and Seventh Circuits, and the only FTC formal advisory opinion on point. In *Lamar*, the Sixth Circuit considered whether a consumer's dispute rights were effectively conveyed or contradicted and overshadowed where the notice of dispute rights had been delivered simultaneously with a mortgage foreclosure summons. The consumer was confronted with two deadlines: 30 days to dispute the validity of the debt and 20 days to answer the complaint. Although the suit papers reflected the two separate deadlines, there

was no additional explanatory language detailing how the answer deadline impacted the dispute deadline. Unlike the instant case, the 20-day answer deadline imposed in the state court foreclosure was shorter than the 30-day dispute period under the FDCPA, yet the *Lamar* Court did not find a violation of the FDCPA.

The *Lamar* Court analyzed the matter under the least sophisticated consumer standard, the same standard purportedly utilized in the Second Circuit, recognizing that the standard "protects naïve consumers" but "it also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Id.* at 510 (citing *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3rd Cir. 2000)). The Court identified the critical question of whether the failure to convey information "clearly and effectively and thereby makes the least sophisticated consumer uncertain" as to his rights. *Id.; see Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 309 (2d Cir. 2003).

The *Lamar* Court rejected the plaintiff's assertions of overshadowing and/or contradiction, holding: "We find that the least sophisticated consumer, after carefully reading the summons, notice and complaint, in their entirety, would not be led to believe that she did not have time in which to dispute the validity of the debt." *Id.* at 511. So strong was the court's view on these and other points it declared, "In fact, Lamar

has not been sanctioned for her suit and appeal only because [the defendant] did not so request." *Id.* at 514, n. 5.

The *Lamar* Court also rejected the plaintiff's invitation to adopt "reconciling" language suggested in other cases interpreting whether lawsuits qualified as initial communications in the Second and Seventh Circuits. *See Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 919-20 (7th Cir. 2004) (*en banc*), superseded by statute, *Goldman v. Cohen*, 445 F.3d 152, 157 (2d Cir. 2006), superseded by statute, *Bartlett v. Heibl*, 128 F.3d 497, 501-02 (7th Cir. 1997), superseded by statute. As the *Lamar* Court correctly held,

> This language is merely a suggestion. Those courts were not faced with determining whether the debt collector's notice, included with the summons and complaint, effectively conveyed to the consumer notice of the thirty-day validation period.
>
> * * *
>
> To require debt collectors to include such language goes beyond the plain language of the statute and favors the consumer at the debt collector's expense.

Id. at 510. As the *Lamar* Court observed, the FDCPA includes no such disclosure requirement.

More recently, district courts in the Seventh and Third Circuits have followed the teachings of *Lamar*.

In *Hall v. Leone Halpin & Konopinski, LLP,* No. 3:06cv343 (RM), 2008 WL 608609 (N.D. Ind. Feb. 28, 2008), the defendant law firm sent a notice purporting to comply with the disclosure requirements of § 1692g at the same time that it filed a collection action. The defendants were given 20 days to file their answer to the action at the same time they were informed that they had 30 days to dispute the debt by contacting the collection law firm. The district court opined that:

> Neither statement is false, and when read together, the statements don't amount to a false statement. Even under an unsophisticated consumer standard . . . a careful reading of the summons and the notice would convey that the documents clearly state the time periods on "separate tracks, *i.e.*, the court's requirements and federal rights under the FDCPA."

Id. at *3 (citing *Lamar*, 503 F.3d at 511). The *Hall* Court also rejected the plaintiff's claims of overshadowing, noting:

> The FDCPA doesn't prohibit the filing of a legal action by a debt collector at any time after the debt has been declared delinquent. *See Weinstein v. Fink,* No. 99C7222, 2001 WL 185194, at *8 (N.D.Ill. Feb. 26, 2001) ["The FDCPA does not prohibit the filing of a legal action by a debt collector against a consumer at any time after the debt has been declared delinquent . . . [and] no court has held that

> the actual filing of a suit overshadows or contradicts the validation notice."].

Id. at *4.

Another District Court rejected a similar challenge to the simultaneous communication of two deadlines: one, when to file an answer to the complaint and two, when to dispute the debt under the FDCPA, in *Oppong v. First Union Mortgage Corporation,* 566 F. Supp.2d 395 (E.D.Pa. 2008). The Court agreed with the reasoning in *Lamar* and rejected the plaintiff's overshadowing claim.

Here, as in all of the foregoing cases, it is clear that there were two clearly identified, separate tracks – one merely to appear in the lawsuit and another to dispute the debt. Moreover, in the instant case, there could be no overshadowing because the period in which an appearance was required ended long after the dispute period. App. 49-50. There was no deadline that was inconsistent with the deadline under the FDCPA. The civil action did not shorten the FDCPA's dispute period in any way.

Courts considering the possibility of overshadowing, even where a civil action sets answer deadlines which differ from the deadline for a dispute under the 15 U.S.C. § 1692g period, have held that no overshadowing occurred. Where, as here, the letter clearly setting forth the Respondent's validation rights is followed by a summons which demands nothing more than a notice of appearance more than a month after the expiration of the § 1692g dispute

period, there is no deception, no confusing ambiguity, no inconsistency or contradiction, and no overshadowing. The *Ellis* opinion stands alone, contrary to the Sixth Circuit and against authority in other jurisdictions, resulting in confusion where there should be uniformity and imposing an inappropriate and different standard of conduct upon attorneys who happen to practice within the Second Circuit. Review by this Court is requested to bring unity in this area of commercial importance.

II. THE SECOND CIRCUIT OPINION UNDERMINES THE LEGITIMATE PURPOSES OF THE FDCPA.

The Petitioners in this matter, mindful of the requirements of the FDCPA, provided in clear fashion the notice required to be conveyed to the consumer by 15 U.S.C. §1692g. Having been retained by a client to file suit, the Petitioners did what they were retained to do – they prepared the file for litigation and, in the absence of a dispute, lawfully commenced a state court action in a manner that did not shorten or otherwise contradict the dispute period as to which the consumer had received proper notice. At that time, no court had held that the mere commencement of litigation would contradict or overshadow the §1692g notice. In fact, the only available authority at the time, the Federal Trade Commission's formal advisory opinion, was to the contrary. *Mezines, FTC Advisory Letter* (March 31, 2000). App. 36-48.

The FDCPA is based on the fundamental premise that "every individual, whether or not he owes [a] debt, has a right to be treated in a reasonable and civil manner." *Cirkot v. Diversified Fin. Sys., Inc.*, 839 F. Supp. 941, 944 (D. Conn. 1993) [referring to the remarks of Representative Frank Annunzio, 123 Cong. Rec. 10241 (1977)]. Petitioners do not contest this principle, but note that the FDCPA must also leave room for legitimate, ethical debt collection activity. The purpose of the FDCPA is to protect consumers from unfair, deceptive, and harassing debt collection practices, while leaving collectors *free to employ efficient, reasonable, and ethical practices* in pursuit of their profession. *Graziano v. Harrison*, 763 F. Supp. 1269 (D. N. J. 1991), *modified on other grounds*, 950 F.2d 107 (3rd Cir. 1991) (emphasis added); *Johnson v. NCB Collection Services*, 799 F. Supp. 1298 (D. Conn. 1992); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383 (D. Del. 1991) [FDCPA does not preclude nonabusive statements to encourage payment]. Though the FDCPA is intended to provide protection to consumers, it is not wholly "one-sided" in favor of consumers. *Lamar*, 503 F.3d at 510. The stated purpose of the FDCPA is "to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumer against debt collection abuses." 15 U.S.C. § 1692(e).

Claims under the FDCPA are evaluated under the "least sophisticated consumer" standard. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

However, not all collection efforts violate the rights of the least sophisticated consumer. "[E]ven the 'least sophisticated consumer' can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Id.* at 1319. Courts ordinarily incorporate an element of reasonableness into even the "least sophisticated debtor." *Id.* at 1319-20. The FDCPA does not extend to every bizarre or idiosyncratic interpretation by a debtor. *Greco v. Trauner, Cohen & Thomas, LLP*, 412 F.3d 360, 363 (2d Cir. 2005). The Second Circuit has made clear that "in crafting a norm that protects the naïve and the credulous the courts have carefully preserved the concept of reasonableness." *McStay v. I.C. Sys., Inc.*, 308 F.3d 188, 190-91 (2d Cir. 2002) (quotations and citations omitted).

The least sophisticated consumer standard presumes a basic level of understanding and willingness to read with care. *Wilson*, 225 F.3d at 350. Even the least sophisticated debtor is bound to read collection communications in their entirety. *Lamar*, 503 F.3d at 510. Although established to ease the lot of the naïve, the standard does not go so far as to provide solace to the willfully blind or non-observant. *Compuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294 (3rd Cir. 2008).

In order for the FDCPA to attain its intended purposes, courts must strike a balance between providing protection to consumers from improper and offensive collection tactics and allowing the collection industry, in a reasonable and efficient manner, to perform its essential function in our economy. Debt

collectors should not be subject to litigation merely because their task is to collect a debt. Accordingly, courts should construe the FDCPA mindful of its legitimate purposes, and aware of its potential abuses. *See, e.g., Lindbergh v. Transworld Sys., Inc.*, 846 F. Supp. 175, 181 (D. Conn. 1994) [The Court rejected an argument under the FDCPA because it reflected "a false, narrow, and overly mechanical reading of the FDCPA."]. The FDCPA is not designed to enable consumers to eliminate the legitimate but adverse consequences of non-payment of debt. *See Catherman v. Credit Bureau of Greater Harrisburg*, 634 F. Supp. 693 (E.D. Pa. 1986); *Wright v. Credit Bureau of Ga., Inc.*, 555 F. Supp. 1005 (N.D. Ga. 1983) [fact recognized by all consumers is that a failure to pay one's bills will affect ability to obtain credit in the future].

Although the FDCPA has been held to apply to attorneys even when engaged in litigation, courts must be careful not to interpret the FDCPA in a way that it represents an unreasonable impediment to civil process. *See Heintz v. Jenkins*, 514 U.S. 291, 296 (1995) ["[I]t would be odd if the FDCPA empowered a debt-owing consumer to stop the 'communications' inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt . . . for an ordinary court-related document does in fact, notify its recipient that the creditor may invoke a judicial remedy."]; *Lewis v. Casey*, 518 U.S. 343, 346 (1996) [access to the courts is a fundamental right]. This Court has warned of the danger of not interpreting the FDCPA in a manner "consistent

with the statute's apparent objective of preserving creditors' judicial remedies." *Heintz*, 514 U.S. at 296.

Courts including the Court of Appeals for the Second Circuit, as well as the Federal Trade Commission, recognize that the thirty day validation period is not a grace period and that collection efforts can proceed in the absence of a dispute. *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997, superseded by statute); *Mezines, FTC Staff Advisory Letter* (March 31, 2000); *Jacobson v. Healthcare Fin. Services, Inc.*, 516 F.3d 85, 90 n. 4 (2d Cir. 2008) ["Our cases recognize the debt collector's right to demand payment, even within the thirty-day period, unless the customer submits a notice of dispute."].

A 2006 amendment to § 809 of the FDCPA confirms the debt collector's right to continue to collect during the thirty day period referred to in 15 U.S.C. § 1692g(a) in the absence of a dispute:

> Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request

> the name and address of the original creditor.

15 U.S.C. § 1692g(b) (2006). This amendment merely codified existing law.

Prior to this action, the FDCPA had never been interpreted to preclude a lawsuit on a delinquent account that had yet to be disputed. "The FDCPA doesn't prohibit the filing of a legal action by a debt collector at any time after the debt has been declared delinquent." *Hall,* 2008 WL 608609 at *4 (citing *Weinstein,* 2001 WL 185194 at *8).

Not only did the Second Circuit wrongly find a contradiction where there was none, the court required attorneys who initiate litigation within the § 1692g dispute period to make an additional required disclosure attempting to explain the differing schedules under the FDCPA and state court procedure. This purported disclosure requirement, however, is not justified or required by the FDCPA.

The FDCPA was not designed to be a debtors' rights disclosure law. By its express terms, the FDCPA requires only two affirmative disclosures by debt collectors, *see* 15 U.S.C. § 1692(e)(11) (requiring disclosure that communication is from a debt collector) and 15 U.S.C. § 1692(g) (specifying disclosure requirements for debt validation notices), and courts have declined to read into the statute additional disclosures that Congress chose not to require. *E.g.*, *Morse v. Dun & Bradstreet, Inc.*, 87 F. Supp.2d 901, 904 (D. Minn. 2000) (declining to "rewrite the FDCPA

to contain a disclosure requirement that Congress clearly chose not to include . . . Such judicial tampering with the FDCPA would be an 'inappropriate exercise of judicial power.'") (quoting *Brown v. ABC Bus. Servs., Inc.*, No. 95 Civ. 10197, 1996 WL 469588, at *3 (S.D.N.Y. Aug. 16, 1996)).

The Sixth Circuit recognized that to require debt collectors to include such explanatory or reconciling language "goes beyond the plain language of the statute and favors the consumer at the debt collector's expense." *Lamar*, 503 F.3d at 510. Such an explanation is entirely unnecessary, especially when, as here, there is no contradiction in the first instance.

The Second Circuit opinion converts the lawful act of commencing litigation on an unpaid debt into liability under the FDCPA. Litigating counsel in the Second Circuit should not be subjected to liability for the very conduct that would be permissible in the Sixth Circuit. The Petitioners here engaged in none of the types of activity sought to be prohibited by the FDCPA. The commencement of a civil action was the very action that Petitioners were lawfully engaged to handle, and they engaged in no deception, misrepresentation, harassment or abuse in doing so.

The Second Circuit opinion creates an unnecessary and artificial barrier to suit completely unintended by the Congress when it adopted the FDCPA. Rather than protecting the consumer from abuse and deception, the opinion below impinges on the otherwise lawful and ethical activities of creditors

and their lawyers. It is completely contrary to the legitimate purposes of the FDCPA.

Indeed, the Second Circuit did not even specify what reconciling language should have been used, leaving open the question of whether any such reconciling language would be adequate, promoting further, unnecessary litigation over the content of the reconciling language. Requiring such disclosures outside the terms of the FDCPA could create a slippery slope, allowing plaintiffs to argue for additional disclosures otherwise not required (*e.g.*, advice concerning the right to file for bankruptcy or to request the cessation of collection activities).

III. THE SUPERIOR COURT LAWSUIT COULD NOT HAVE INTERFERED WITH THE EXERCISE OF THE RESPONDENT'S DISPUTE RIGHTS.

Under 15 U.S.C. § 1692g, the Respondent possessed the following rights: (1) the right to dispute all or a portion of the debt in question; (2) the right to seek verification of the debt; and (3) the right to seek the name of the original creditor, if different from the current creditor. The existence of the Connecticut Superior Court lawsuit could not have interfered in any way with the Respondent's rights.

First, the suit is not at all inconsistent with the Respondent's right to dispute all or a portion of the debt in question. The civil action did not preclude such a dispute; instead, it provided a forum for its

resolution. Whether or not Respondent disputed the debt in response to the Petitioners' initial letter, the Respondent retained the right to dispute any or all of the debt, if appropriate, during the thirty day validation period or thereafter. The civil action clearly grants the consumer an *additional* opportunity to dispute the debt. No reasonable reading of the civil summons or complaint could have caused the defendant consumer to doubt his right to dispute the debt.

Nor was the right to seek verification of the debt compromised. Had plaintiff sought verification, the defendant law firm would have been required to supply a modest amount of information. *See Chaudry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999) ["[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed."]. Accordingly, had the plaintiff sought verification, the Connecticut Superior Court complaint provided all of the information that Solomon would have been required to provide in response to a consumer's request for verification. *See Holsinger v. Wolpoff & Abramson LLP*, No. C05-02075 JF (PVT), 2006 WL 2092632 at *14 (N.D.Cal. 2006) [Court found that defendant law firm's arbitration demand satisfied its obligation to verify the debt.]. Under such circumstances, the plaintiff's rights to verification could not have been compromised by documents which themselves provide the information essential to verification.

The Petitioners should not be deemed to overshadow the Respondent's dispute right when the lawsuit, rather than cutting off the opportunity to dispute, expands it. Moreover, the Petitioners should not be deemed to overshadow the Respondent's right to seek verification when they have already provided much if not all of the information needed for such verification to Respondent. The civil action did not undermine the Respondent's rights in any way. The result in the Second Circuit lacks common sense and legal logic. Petitioners should not be penalized for engaging in legitimate, ethical and lawful debt collection activity.

CONCLUSION

For the reasons stated, petitioners Solomon & Solomon, P.C., Douglas Fisher and Julie S. Farina respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: April 12, 2010

Respectfully submitted,

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591 F.3d 130

United States Court of Appeals,
Second Circuit.
Janet ELLIS, Plaintiff-Appellee,
v.
SOLOMON AND SOLOMON, P.C., Julie S. Farina, and Douglas Fisher Defendants-Appellants.
Docket No. 09-1247-cv.

Argued: Nov. 20, 2009.
Decided: Jan. 13, 2010.

Jonathan Elliot, Zeldes, Needle & Cooper, P.C., for Defendants-Appellants.

Joanne S. Faulkner, New Haven, CT, for Plaintiff-Appellee.

Thomas R. Dominczk, Maurice & Needleman, P.C., (Donald Maurice, Jr., Maurice & Needleman, P.C., Tomio B. Narta, Simmonds & Narita LLP, Eric M. Berman, Eric M. Berman, P.C., on the brief), for Amicus Curiae The National Association of Retail Collection Attorneys, in support of Defendants-Appellants.

Before CABRANES and SACK, Circuit Judges, and CROTTY, District Judge.*

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* The Honorable Paul A. Crotty, of the United States District Court for the Southern District of New York, sitting by designation.

PAUL A. CROTTY, District Judge:

Defendants-appellants, the law firm Solomon and Solomon, P.C. ("Solomon"), and two of its attorneys, Julie S. Farina ("Farina") and Douglas Fisher ("Fisher") (collectively "the defendants"), appeal from a decision and judgment of the United States District Court for the District of Connecticut (Janet Bond Arterton, *Judge*) granting summary judgment to plaintiff-appellee Janet Ellis ("Ellis") on her claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA" or "the Act").

Within five days of a debt collector's initial communication with a debtor (referred to in the Act as a "consumer"), the debt collector must send the consumer a written "validation notice" setting forth, among other things, the consumer's right to dispute the debt. *See* 15 U.S.C. § 1692g(a). The consumer has thirty days from receipt of the validation notice to send the debt collector a notification disputing the debt. *See* § 1692g(a), (b). Unless the consumer disputes the debt, the debt collector is generally free to continue its collection activities and to communicate with the consumer during the thirty-day "validation period." *See* § 1692g(b); *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 89 (2d Cir.2008). Collection activities and communications by the debt collector during the validation period must not, however, overshadow or be inconsistent with the disclosures the Act requires be provided in the validation notice. *See* § 1692g(b); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir.1996).

After sending a validation notice, and during the validation period, the defendants caused a Connecticut State Marshal to serve Ellis with a summons and complaint. The defendants failed to inform Ellis that commencement of the lawsuit had no effect on the information contained in the validation notice. The District Court found that the service of the summons and the compliant [sic] overshadowed the validation notice in violation of the FDCPA. The defendants argue that under the controlling "least sophisticated consumer" standard, service of the summons and complaint did not overshadow the disclosures made in the validation notice. We disagree, and for the reasons that follow, we affirm the District Court.

Background

The material facts are not in dispute. Ellis owed $17,809.13 on her Citibank (South Dakota), N.A. ("Citibank") credit card. Wishing to collect, in May, 2005, Citibank referred Ellis' account to Solomon "with authorization to sue." On May 13, 2005, Solomon mailed a letter to Ellis at her home in Greenwich, Connecticut. After setting forth the amount claimed to be owed by Ellis to Citibank, the letter states:

> The above named creditor has referred this account to our office for collection with a notation that all communications cease and desist. Under Federal Law, however, we must provide you with certain disclosures.

> This is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector. Calls are randomly monitored to ensure quality service.
>
> VALIDATION NOTICE
>
> Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of the debt, or any portion thereof, the debt will be assumed valid by this office. If you notify this office in writing within the thirty (30) day period that the debt, or any portion thereof is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of such verification will be mailed to you by this office. Upon your written request within the thirty (30) day period, this office will provide you with the name and address of the original creditor, if different from the current creditor.
>
> Ellis acknowledges that she received the letter and that she never disputed the debt.

Shortly after the letter was sent, Ellis' file was given to Farina for review. Farina decided to take legal action and had another Solomon attorney prepare a summons and complaint to be filed on Citibank's behalf in a collection action against Ellis in Connecticut Superior Court. The complaint, which Farina signed, claims that Ellis failed to make payments on credit extended by Citibank and

demands $17,809.13 in damages in addition to costs and disbursements. Both Farina and Fisher signed the summons, which has a return date of July 19, 2005. Under the heading, "NOTICE TO EACH DEFENDANT," the summons states, in bold and in capital letters: "YOU ARE BEING SUED." The summons also states that "[t]o respond to this Summons, or to be informed of further proceedings, you or your attorney must file a form called an 'Appearance' with the Clerk of the above-named Court at the above Court address on or before the second day after the return date." Defendants who believe that they have insurance coverage for the claim asserted in the complaint are advised to "immediately take the Summons and Complaint to your insurance representative." Defendants with questions about the summons are directed to "consult an attorney promptly."

Ellis was personally served with the summons and complaint by a Connecticut State Marshal at her home on May 31, 2005, when there were two more weeks to run on the validation period. On June 13, 2005, the summons and complaint were filed in Connecticut Superior Court. The defendants never said anything to Ellis regarding the effect of the lawsuit on the information conveyed in the May 13, 2005 letter.

On October 20, 2005, Ellis filed suit against the defendants under the FDCPA, and on April 3, 2008, Ellis amended the complaint. The amended complaint asserts that the defendants violated numerous

provisions of the FDCPA, including §§ 1692c-1692g, in the course of their efforts to collect the debt allegedly owed by Ellis to Citibank. As relief, Ellis sought damages and equitable relief, in addition to attorneys' fees and costs.

Ellis moved for partial summary judgment, and defendants cross-moved for summary judgment on all of the claims in the amended complaint. The District Court granted Ellis summary judgment on her claim that the defendants violated § 1692g of the FDCPA by serving her with the summons and complaint during the validation period, holding that,

> in a case such as this, where Plaintiff is served with a summons and complaint in a collection action against her by a debt-collector within the 30-day validation period but no accompanying communication is given to the consumer assuring her that the validation period and rights remain in force and are not affected by service of the lawsuit, the earlier notice of the consumer's rights is overshadowed. Having filed suit against Ms. Ellis without any clarifying communication that her dispute right continued notwithstanding the pendency of the suit, Defendants violated the FDCPA. . . .

Ellis v. Solomon & Solomon, P.C., 599 F.Supp.2d 298, 304 (D.Conn.2009).

Since a single violation of the FDCPA is sufficient to impose liability, the District Court dismissed Ellis' remaining claims as moot, denied the defendants'

motion for summary judgment on the § 1692g claim, and denied the remainder of the defendants' motion as moot. Ellis was awarded $1,000 in statutory damages in addition to costs and attorneys' fees. This timely appeal ensued.[1]

Standard of Review

We review a grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure *de novo*. *Molinari v. Bloomberg*, 564 F.3d 587, 595 (2d Cir.2009). The judgment will be upheld "only if the evidence, viewed in the light most favorable to the party against whom it is entered, demonstrates that there are no genuine issued [sic] of material fact and that the judgment was warranted as a matter of law." *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir.2008) (citing Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Rubens v. Mason*, 527 F.3d 252, 254 (2d Cir.2008)).

Discussion

Congress enacted the FDCPA to eliminate "abusive practices in the debt collection industry, and . . . to ensure that 'those debt collectors who refrain from using abusive debt collection practices are not

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[1] With the consent of the parties, the National Association of Retail Collection Attorneys has filed an amicus brief in support of the defendants.

competitively disadvantaged.'" *Jacobson,* 516 F.3d at 89 (quoting 15 U.S.C. § 1692(e)). The Act focuses on regulating interactions between "debt collectors" and "consumers." Ellis, as a "natural person obligated or allegedly obligated to pay any debt," clearly fits the definition of "consumer," 15 U.S.C. § 1692a(3); and the parties agree that the defendants are "debt collectors." § 1692a(6); *see Heintz v. Jenkins,* 514 U.S. 291, 299, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

FDCPA § 1692g, "Validation of debts," was enacted to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S.Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1659, 1699; *see also Bartlett v. Heibl,* 128 F.3d 497, 499 (7th Cir.1997) ("These provisions are intended for the case in which the debt collector, being a hireling of the creditor rather than the creditor itself, may lack first-hand knowledge of the debt."). Unless set forth in the debt collector's "initial communication" with the consumer, the debt collector must send the consumer a written "validation notice" within five days of the initial communication. The validation notice must contain:

> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any

> portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

§ 1692g(a).

After receiving a validation notice, the consumer has thirty days to mail a notice to the debt collector disputing the debt or requesting the name and address of the original creditor. *Jacobson,* 516 F.3d at 95. If the consumer disputes the debt or requests the name and address of the original creditor during the thirty-day "validation period," the debt collector must "cease collection of the debt, or any disputed portion thereof" until the debt collector verifies the debt or obtains the name and address of the original creditor and "a copy of such verification . . . or name and address of the original creditor, is mailed to the consumer by the debt collector." § 1692g(b). However,

the validation period "is not a 'grace period'; in the absence of a dispute notice, the debt collector is allowed to demand immediate payment and to continue collection activity." *Jacobson,* 516 F.3d at 89; *see* § 1692g(b) (as amended by the Financial Services Regulatory Relief Act of 2006, Pub.L. No. 109-351, § 802(c), 120 Stat. 1966, 2006-07 (2006)). While debt collectors are largely free to continue collection activities during the validation period, this Court has long held that validation period collection activities and communications must not "overshadow" or "contradict" the validation notice. *Jacobson,* 516 F.3d at 90-91; *McStay v. I.C. Sys., Inc.,* 308 F.3d 188, 190 (2d Cir.2002); *Clomon v. Jackson,* 988 F.2d 1314, 1319 (2d Cir.1993). When Congress amended the FDCPA in 2006, it adopted and codified the Court's approach. Section 1692g(b) now provides: "Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor." § 1692g(b) (as amended by the Financial Services Regulatory Relief Act of 2006, Pub.L. No. 109-351, § 802(c), 120 Stat. 1966, 2006-07 (2006)); *see Jacobson,* 516 F.3d at 91 (noting that "Congress has now codified our approach. . . .").

Whether collection activities or communications within the validation period overshadow or are inconsistent with a validation notice is determined under the "least sophisticated consumer" standard. *Greco v. Trauner, Cohen & Thomas, L.L.P.,* 412 F.3d

360, 363 (2d Cir.2005). It is an objective standard, designed to protect all consumers, "the gullible as well as the shrewd." *Jacobson,* 516 F.3d at 90. A collection activity or communication "overshadows or contradicts the validation notice 'if it would make the least sophisticated consumer uncertain as to her rights.'" *Id.* (quoting *Russell,* 74 F.3d at 35).

The hypothetical least sophisticated consumer does not have "the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer," but is neither irrational nor a dolt. *Russell,* 74 F.3d at 34. While protecting those consumers most susceptible to abusive debt collection practices, this Court has been careful not to conflate lack of sophistication with unreasonableness. *See McStay,* 308 F.3d at 190-91 ("[T]his Court has . . . made clear that 'in crafting a norm that protects the naive and the credulous the courts have carefully preserved the concept of reasonableness.'" (quoting *Clomon,* 988 F.2d at 1319)). As such, "the FDCPA does not aid plaintiffs whose claims are based on 'bizarre or idiosyncratic interpretations of collection notices.'" *Jacobson,* 516 F.3d at 90 (quoting *Clomon,* 988 F.2d at 1320). Indeed, "some courts have held that 'even the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care.'" *Greco,* 412 F.3d at 363 (quoting *Clomon,* 988 F.2d at 1318-19).

To recover damages under the FDCPA, a consumer does not need to show intentional conduct on the part of the debt collector. The Act "is a strict liability statute, and the degree of a defendant's culpability may only be considered in computing damages." *Bentley v. Great Lakes Collection Bureau, Inc.,* 6 F.3d 60, 63 (2d Cir.1993) (internal citation omitted) (citing *Clomon,* 988 F.2d at 1320; 15 U.S.C. § 1692k(b)).

In *Goldman v. Cohen,* 445 F.3d 152 (2d Cir.2006), this Court held that the commencement of a lawsuit by a debt collector seeking to recover an unpaid consumer debt qualified as an "initial communication" for purposes of § 1692g(a). Since the debt collector's initial communication with the consumer was the initiation of a lawsuit, the debt collector had to send the consumer a validation notice within five days of service. The Court recognized, however, that "[i]n cases where debt collectors send debtors a validation notice either along with a summons and complaint or shortly thereafter . . . [there is a] risk that some debtors will become confused." *Goldman,* 445 F.3d at 157. Seeking to avoid such confusion, the Court explained that "it is imperative that a debt collector (1) 'make clear that the advice contained in the § 1692g validation notice in no way alters the debtor's rights or obligations with respect to the lawsuit' and (2) 'emphasiz[e] that courts set different deadlines for filings.'" *Id.* (quoting *Thomas v. Law Firm of Simpson & Cybak,* 392 F.3d 914, 919 (7th Cir.2004) (en banc)

rev'g 354 F.3d 696 (7th Cir.2004)). The Court joined the Seventh Circuit,

> in exhorting debt collectors who choose to send § 1692g validation notices along with paperwork initiating legal proceedings to send debtors a notice, such as one containing the following language, that will ensure compliance with the FDCPA while only minimally disrupting the litigation process:
>
> This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint [or other legal pleading]. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court's rules and the judge's instructions.

Id. (quoting *Thomas,* 392 F.3d at 919-20).

While the 2006 amendments to the FDCPA superceded *Goldman's* holding that the institution of a lawsuit constitutes an initial communication, *see* § 1692g(d) (added by the Financial Services Regulatory Relief Act of 2006, Pub.L. No. 109-351, § 802(a), 120 Stat. 1966, 2006 (2006)), there is still the real potential for confusion when a consumer is served with a lawsuit during the validation period. As explained by the District Court, "[w]ithout some

explanation to the consumer of the relationship between [the] suit and [the] provisions in the notice, it may well appear to the least sophisticated consumer that being taken to court trumps any other out-of-court rights she had." *Ellis*, 599 F.Supp.2d at 304. For substantially the same reasons given by the District Court, we affirm, and hold that the validation notice is overshadowed where a debt collector serves a consumer with process initiating a lawsuit during the validation period, without clarifying that commencement of the lawsuit has no effect on the information conveyed in the validation notice. We write principally to explain how debt collectors can avoid running afoul of § 1692g in the future.

Defendants did not have to serve Ellis during the validation period; they could have waited until the validation period expired. It is difficult to discern what tactical advantage was gained by commencing a lawsuit when the validation period had only two weeks to run, especially since the return date on the summons was not until mid July – a full month after the validation period expired. Of course, debt collectors may continue collection activities, including commencing litigation, during the validation period; but in doing so the debt collector must not transgress § 1692g(b)'s proscription of collections activities that "overshadow or . . . [are] inconsistent with" the validation notice.

If the debt collector chooses not to wait until the end of the validation period to commence debt collection litigation, an explanation of the lawsuit's

impact – or more accurately, lack of impact – on the disclosures made in the validation notice must be provided. This explanation should be set forth in either the validation notice itself, or in a notice provided with the summons and complaint. The best practice is to provide an explanation in both the validation notice and the summons and complaint. Clarifying that commencement of a lawsuit does not trump the validation notice will come at little or no cost to debt collectors and will ensure that the consumer rights secured under the FDCPA are not overshadowed or contradicted.

CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

599 F.Supp.2d 298

United States District Court,
D. Connecticut.
Janet **ELLIS**, Plaintiff,
v.
SOLOMON & SOLOMON, P.C., Julie S. Farina, and Douglas Fisher, Defendants.
Civil No. 3:05cv1623 (JBA).

Feb. 23, 2009.

Joanne S. Faulkner, Law Offices of Joanne Faulkner, New Haven, CT, for Plaintiff.

Jonathan D. Elliot, Kristen Luise Zaehringer, Zeldes, Needle & Cooper, Bridgeport, CT, Sabato Pellegrino Fiano, Kleban & Samor, PC, Southport, CT, for Defendants.

RULING ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [Doc. # 62], DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. # 70], and PLAINTIFF'S MOTION TO DENY, OR ALTERNATIVELY TO DELAY RULING ON, DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. # 82]

JANET BOND ARTERTON, District Judge.

Plaintiff Janet Ellis alleges that Solomon & Solomon, P.C. ("Solomon"), a New York and Connecticut law

firm, and two of its attorneys, Julie S. Farina[1] and Douglas Fisher, violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA" or "Act")[2] by sending her a debt collection letter knowing of her earlier request for no communications regarding her debt, by filing suit against her during the statutory validation period, thereby "overshadowing" the preexisting notice of her right to dispute her debt, and by listing an ineligible person in the recognizance section of the civil summons related to that suit. After discovery concluded, Plaintiff moved for partial summary judgment [Doc. # 62] and Defendants cross-moved for summary judgment [Doc. # 70] as to all claims. Plaintiff moved [Doc. # 82] to deny Defendants' cross-motion pending resolution of her summary judgment motion or, alternatively, for an extension of time to respond to Defendants' cross-motion. For the reasons that follow, summary judgment is granted to Plaintiff on her overshadowing claim, Defendants' cross-motion for summary judgment on that claim is denied and denied as moot otherwise, and Plaintiff's motion to deny or for an extension of time is denied as moot.

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[1] Defendant Farina has since changed her last name to Solomon. ([Farina] Dep., Ex. 7 to Pl.'s 56(a)1 Stmt. [Doc. # 62-2], at 26:18-24.) Consistent with the parties, the Court will refer to Defendant Farina by her former last name throughout its Ruling.

[2] Unless otherwise specified, all statutes cited in this Ruling are located within Title 15 of the United States Code.

I. Factual Background

The following facts are not in dispute. Citibank (South Dakota), N.A. ("Citibank") issued a credit card to Ms. Ellis, which she used for personal purposes. (Fisher Aff. [Doc. # 69] at ¶ 4; Ellis Aff., Ex. 1 to Pl.'s 56(a)1 Stmt. [Doc. # 62-2], at ¶ 3.) By May 12, 2005 Ms. Ellis had accrued a balance on this credit card of $17,809.13, at which point Citibank ceased communications with her (Reece Aff. [Doc. # 77] ¶¶ 8-9 & Ex. 1) and transferred her account "to Solomon with authorization to sue" (*id.* ¶ 8). On May 13, 2005, Solomon, a debt-collector within the meaning of the FDCPA,[3] sent Ms. Ellis a letter on law firm letterhead listing Solomon's name, address, and a "toll free" number, which read as follows:

> RE: OUR FILE NO. 16845563 ACCT NO. [XXXXXXXXXXXX]
>
> CITIBANK (SOUTH DAKOTA) N.A.
>
> Amount due as of 05/13/2005: $17809.13

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[3] Solomon has admitted that its "principal business in Connecticut is the collection of individual accounts owed to Citibank and other creditors, using the instrumentalities of interstate commerce, including telephone and mail services." (Defs.' Response to Pl.'s Req. For Admission, Ex. 6 to Pl.'s 56(a)1 Stmt., at # 6.) *Cf.* § 1692a(6) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts[.]").

Dear Sir/Madam:

The above named creditor has referred this account to our office for collection with a notation that all communications cease and desist. Under Federal Law, however, we must provide you with certain disclosures.

This is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector. Calls are randomly monitored to ensure quality service.

VALIDATION NOTICE

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of the debt, or any portion thereof, the debt will be assumed to be valid by this office. If you notify this office in writing within the thirty (30) day period that the debt, or any portion thereof is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of such verification will be mailed to you by this office. Upon your written request within the thirty (30) day period, this office will provide you with the name and address of the original creditor, if different from the current creditor.

Very truly yours,

SOLOMON AND SOLOMON, P.C.

(Ex. 4 to Pl.'s Rule 56(a)1 Stmt. [Doc. # 62-2] & Ex. B to Fisher Aff. [Doc. # 78] ("May 13th Letter").) This letter was Defendants' initial communication with Plaintiff. (*See* Ellis Dep., Ex. A to Defs.' Cross-Mot. Summ. J. [Doc. # 70], at 52:12-18.) Ms. Ellis never notified Solomon by any means of any dispute about the debt sought to be collected. (*See id.* at 57:22-24.) Through two of its attorneys, Defendants Fisher and Farina, Solomon thereafter prepared a complaint to be filed as a collection action against Ms. Ellis in Connecticut Superior Court (Stamford-Norwalk Judicial District), and prepared a summons on May 23, 2005 to be served along with the complaint on Ms. Ellis. The "recognizance" listed Defendant Fisher as a "person recognized to prosecute in the amount of $250." *See* Conn. Gen.Stat. § 52-185. (*See also* Ex. 5 to Pl.'s Rule 56(a)1 Stmt. & Fisher Aff. Ex. D ("Summons & Complaint"); Fisher Aff. ¶ 26.) A State Marshal served Ms. Ellis in-hand with a summons and a copy of the complaint on May 31, 2005. (*See* Ex. 1 to Pl.'s Rule 56(a)1 Stmt. (Ellis Aff.) at ¶ 3; Fisher Aff. Ex. D.) The summons indicated a "Return Date" of July 19, 2005. (*See* Summons & Complaint.) In connection with service of process, Defendants provided Plaintiff with no communication referencing or related to the 30-day dispute period that Defendants had outlined in the "VALIDATION NOTICE" section of the May 13th Letter. (*See id.*)

II. Standards

A. Summary Judgment

Summary judgment is appropriate where the record after discovery "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue of fact is "material" if it "might affect the outcome of the suit under the governing law," and is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" based on it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "The moving party bears the burden of showing that he or she is entitled to summary judgment." *Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir.2005). The Court "construe[s] the evidence in the light most favorable to the non-moving party and . . . draw all reasonable inferences in its favor." *Id.* (quotation omitted, second alteration in original). If the record as a whole, viewed in the light most favorable to the non-moving party, "could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment should follow. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quotation marks omitted). In sum, "summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir.2006) (quotation omitted).

B. FDCPA Principles: Validation Notices, Validation Periods, and the Least Sophisticated Consumer Standard

Under the FDCPA, a debt-collector must send any consumer whose debt it seeks to collect "a written notice containing" five disclosures:

> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

§ 1692g(a). Together, these disclosures constitute the "validation notice." The thirty-day period specified in § 1692g(a)(3)-(5) is the "validation period."

The FDCPA bars debt-collectors from engaging in a variety of abusive practices while attempting to collect a debt,[4] and requires any communication made by a debt-collector during the validation period not to "overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor." § 1692g(b); *see also Jacobson v. Healthcare Fin. Servs.*, 516 F.3d 85, 90-91 (2d Cir.2008) (overshadowing communications violate § 1692g(a)).

"When determining whether [the FDCPA] has been violated, an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice received from the debt collector, is applied." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d

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[4] Among other things, the FDCPA prohibits debt-collectors from communicating with consumers "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer," § 1692c(a)(1); communicating with consumers regarding most issues "[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer," § 1692c(c); engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," § 1692d; "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," § 1692e; and "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," § 1692f.

Cir.1996) (applying least sophisticated consumer standard to § 1692g); *see also Clomon,* 988 F.2d at 1318-20. The least sophisticated consumer standard is designed to serve a "dual purpose: it (1) ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and (2) protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon,* 988 F.2d at 1320.

The Second Circuit has explained that the FDCPA prohibits the debt-collector from communicating with a consumer in a way that "conveys [the validation notice] in a confusing or contradictory fashion so as to cloud the required message with uncertainty. Thus, a debt-collector violates the Act if its communication is 'reasonably susceptible to an inaccurate reading' of the required message." *DeSantis v. Computer Credit, Inc.,* 269 F.3d 159, 161 (2d Cir.2001) (quoting *Russell,* 74 F.3d at 35 and citing *Savino v. Computer Credit, Inc.,* 164 F.3d 31, 85 (2d Cir.1998)). This requirement both protects consumers and imposes an obligation on debt-collectors to ensure the continued clarity of a consumer's validation period:

> A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights. It is not enough for a debt collection agency simply to include the proper debt validation notice in a mailing to a consumer – Congress intended that such notice be clearly conveyed.

Russell, 74 F.3d at 35; *see also Savino,* 164 F.3d at 85 ("A debt collection notice is overshadowing or contradictory if it fails to convey the validation information clearly and effectively and *thereby* makes the least sophisticated consumer uncertain as to her rights.") (emphasis added); *Jacobson,* 516 F.3d at 90 (under the FDCPA, a debt-collector "has the obligation, not just to convey the information, but to convey it clearly").

The sending of validation notices and subsequent notices or letters by a debt-collector to a consumer are not the only actions that could cause a consumer to be uncertain as to her rights in violation of the Act. Indeed, Congress's 2006 amendments to the FDCPA expressly include "collection activities" within the types of activities that violate the Act if they overshadow the validation period:

> [While] *[c]ollection activities* and communications that do not otherwise violate this title may continue during the 30-day period[,] . . . [a]ny *collection activities* and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

§ 1692g(b) (as amended by the Financial Services Regulatory Relief Act of 2006, Pub. L. 109-351 § 802(c) (Oct. 13, 2006)) (emphases added); *see also Jacobson,* 516 F.3d at 90-91 (observing that 2006 amendments "codified our approach" of holding that

§ 1692g is violated by overshadowing communications). A debt-collector's collection lawsuit, including service of such suit on the consumer, is undoubtedly "collection activit[y]." *Cf. Jacobson,* 516 F.3d at 89 & n. 4 (clarifying that "collection activity" and "demand[s for] immediate payment" are separate actions by noting that "in the absence of a dispute notice, the debt collector is allowed to demand immediate payment *and* to continue collection activity"; and stating that the debt-collector's right to engage in collection activity during the validation period "has now been made explicit in the statutory text by the 2006 Amendments to the FDCPA") (emphasis added).

The Second Circuit has also observed that when a debt-collector serves a consumer with a summons and complaint simultaneously with or shortly after it provides a validation notice to that consumer, there is a "risk that some debtors will become confused" as to the continued vitality of their validation period and that "[t]o avoid such confusion, it is *imperative* that a debt collector" clarify that court deadlines are distinct and separate from the validation period under the FDCPA. *Goldman v. Cohen,* 445 F.3d 152, 157 (2d Cir.2006) (citing *Thomas v. Law Firm of Simpson & Cybak,* 392 F.3d 914, 919-20 (7th Cir.2004)) (emphasis added).[5]

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[5] While the main holding of *Goldman* – that service of process constitutes an "initial communication" for purposes of the FDCPA, *see* 445 F.3d at 155 & 157 – was overruled by statutory amendment, *see* § 1692g(d) (added by Pub. L. 109-351

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III. Discussion

While Plaintiff asserts that Defendants violated the FDCPA in a number of ways,[6] the Court addresses her claim that Defendants "overshadow[ed] or contradict[ed] the validation notice" by filing suit against her within the validation period and without any explanation of the suit's relationship to the notice that Defendants provided to Plaintiff 18 days earlier. (Am. Compl. ¶ 9.) Given the FDCPA's regulation of "collection activities" by debt-collectors and communications between them and consumers, and the undisputed fact that service of process on Plaintiff was at Defendants' direction, and that the complaint served on Plaintiff was collection activity addressed to the debt at issue in the May 13th Letter, it is clear that

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§ 802(a)), the Circuit's observation that service of process could confuse a consumer is undisturbed, especially in light of Congress's simultaneous addition of an express requirement that no "collection activit[y] . . . overshadow or be inconsistent with" the validation notice and validation period.

[6] In addition to claiming that Defendants overshadowed her validation notice, Plaintiff claims that Solomon violated the Act because it "communicated with [her] at a time and place known to be inconvenient" (Am. Compl. [Doc. # 63] ¶ 6; *see also* Pl.'s Mem. Supp. Summ. J. [Doc. # 56-1, incorporated by reference by Doc. # 62-1] at 4) and because it "misrepresented that [Solomon] was required to send" the May 13th Letter under federal law even though federal law "compelled no such thing in this case" (Am. Compl. ¶ 7; Pl.'s Mem. Supp. Summ. J. at 4). She also claims that Defendants communicated with her despite knowing that "she did not want such communications" (Pl.'s Mem. Supp. Summ. J. at 4) and "provided a false recognizance in the summons to facilitate collection" (*id.*).

the FDCPA's prohibition on engaging in collection activities or sending communications that overshadow a consumer's validation period applied to Defendants' service of their lawsuit on Plaintiff. If service of that lawsuit would make the least sophisticated consumer uncertain as to the timing or existence of FDCPA rights described in the validation notice, then such service violates § 1692g. *See* § 1692g(b); *Russell*, 74 F.3d at 35; *Jacobson*, 516 F.3d at 90.

Defendants are correct that debt-collectors are not prohibited from initiating legal action against consumers during the 30-day validation period. However, debt-collectors are required to ensure that such debt collection legal action does not overshadow the message in the validation notice they gave to consumers where the validation period is still in effect. Without some explanation to the consumer of the relationship between suit and provisions in the notice, it may well appear to the least sophisticated consumer that being taken to court trumps any other out-of-court rights she had. Here, Defendants took no steps to communicate to or clarify for Plaintiff that the summons and complaint with which she was served on May 31st did not shorten or terminate her 30-day validation period, which ended June 12, 2005, or otherwise alter Defendants' obligation to validate her debt upon her dispute of such debt.[7] Faced with

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[7] This fact alone renders inapposite the case on which Defendants rely for the proposition that filing of a suit does not overshadow a validation notice. (*See* Defs.' Mem. at 15.) In *Hall*

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service of a summons and a civil complaint to be filed in court seeking repayment of a consumer debt, a consumer could reasonably be confused about whether her opportunity to contest the debt whose collection is sought in the complaint was now limited to defending the lawsuit against her. The "Return Date" appearing on the summons is undefined and even though it post-dates the conclusion of the validation period, its significance would not be readily apparent to the least sophisticated consumer who only knows she is being sued. Even if a consumer determines that she was not obligated to respond in court until the "return date" which is after the validation period ends, that understanding does not dispel doubt or uncertainty about whether she still retains the right to

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v. Leone Halpin & Konopinski, LLP, the Northern District of Illinois held that where a debt-collector law firm filed a complaint and attached to it a validation notice, and such complaint, together with its attachments, was served along with a summons on a consumer, the complaint and summons did not overshadow the validation notice whose 30-day dispute period commenced upon service. *Hall,* No. 3:06-CV-343 RM, 2008 WL 608609, *4 (N.D.Ill. Feb. 28, 2008). Moreover, *Weinstein v. Fink,* which *Hall* quotes for the proposition that "no court has held that the actual filing of a suit overshadows or contradicts the validation notice," *id.* (quoting *Weinstein,* No. 99 C 7222, 2001 WL 185194, *8 (N.D.Ill. Feb. 26, 2001)), predates Congressional amendment of § 1692g(b) to prohibit *any* "collection activities and communication" from overshadowing the validation notice. *Weinstein* also predates cases in both the Seventh and Second Circuits which have expressly identified the "risk" that service of a lawsuit could confuse a consumer as to the vitality of her dispute right and thus overshadow a validation notice. *Goldman,* 445 F.3d at 157; *Thomas,* 392 F.3d at 919-20.

dispute the debt as described in the validation notice, or whether the lawsuit signaled her loss of that opportunity or method of disputing or obtaining verification. Thus, in a case such as this, where Plaintiff is served with a summons and complaint in a collection action against her by a debt-collector within the 30-day validation period but no accompanying communication is given to the consumer assuring her that the validation period and rights remain in force and are not affected by service of the lawsuit, the earlier notice of the consumer's rights is overshadowed. Having filed suit against Ms. Ellis without any clarifying communication that her dispute right continued notwithstanding the pendency of the suit, Defendants violated the FDCPA,[8] and summary judgment is granted to Plaintiff on this ground.

A single violation of any of these provisions "is sufficient to establish civil liability under the FDCPA." *Clomon v. Jackson,* 988 F.2d 1314, 1318 (2d Cir.1993); § 1692k (imposing civil liability on "*any* debt collector who fails to comply with *any* provision of this subchapter with respect to *any* person") (emphases

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[8] Because this is the manner in which Defendants violated the Act, the fact that Ms. Ellis never disputed the debt with Solomon within the validation period is immaterial. Indeed, the very purpose of the FDCPA's prohibition on overshadowing is to protect consumers *who have not disputed their debt* by ensuring that these consumers understand that their dispute right continues to exist throughout the validation period, notwithstanding other communications or collection actions taken by the debt-collector.

added). As Plaintiff explained in her Motion for Partial Summary Judgment, since she "needs only one violation to prevail," she will withdraw all other grounds if one of her grounds prevails. (Pl.'s Mot. Part. Summ. J. [Doc. # 62] at 1.) At oral argument Plaintiff's counsel reiterated her position that upon the grant of summary judgment in her favor as to any claim, her remaining claims would be moot. Therefore, Defendants' Cross-Motion for Summary Judgment [Doc. # 70] is denied as to the claim of overshadowing and denied as moot as to the remaining claims, and Plaintiff's Motion to Deny or Delay Ruling [Doc. # 82] is denied as moot.

IV. Damages

Under § 1692k, Defendants are liable to Plaintiff for "any actual damage," "additional damages" of up to $1,000, and "the costs of the action, together with a reasonable attorney's fee as determined by the court." § 1692k(a)(1)-(3). Plaintiff explains that "[s]he seeks only statutory damages of $1,000." (Pl.'s Mot. Part. Summ. J. [Doc. # 62] at 1.) In determining whether to award the maximum $1,000, the Court must consider "the frequency and persistence of non-compliance by the debt-collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." § 1692k(b)(1). It may also consider other factors. *Id.*

While there is no evidence that Defendants specifically intended to violate the FDCPA, Defendants

Fisher and Farina testified that there is nothing "untypical" about the short duration of time between Defendants' initial communication with Ms. Ellis and their filing of suit against her because such duration "doesn't matter" ([Farina] Dep., Ex. 7 to Pl.'s 56(a)1 Stmt., at 43:22-45:3), that Defendants intended to file suit against Ms. Ellis within the validation period (*id.*), and that Defendants intentionally decline to attach any validation notice to a complaint that will be served on a consumer whose debts they seek to collect even though they are aware of the Second Circuit's view in *Goldman* that it is "imperative" that a validation notice or some other notice be attached to the complaint or sent to the consumer soon afterwards (Fisher Dep., Ex. 8 to Pl.'s 56(a)1 Stmt., at 53:4-8 & 54:11-22). On the basis of this testimony, the Court concludes sufficient frequency and persistence of conduct exist such that the maximum statutory damages of $1,000 should be awarded.

In addition, Ms. Ellis is entitled to recover "the costs of the action, together with a reasonable attorney's fee as determined by the court" under § 1692k(a)(3). In accordance with Federal Rule of Civil Procedure 54(d), Plaintiff's claim for attorney's fees, expenses, and costs shall be filed 14 days after entry of Judgment.

V. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment [Doc. # 62] is GRANTED as to

the overshadowing claim; Defendants' Cross-Motion for Summary Judgment [Doc. # 70] is DENIED as to the overshadowing claim and DENIED AS MOOT as to the remaining claims; and Plaintiff's Motion to Deny, or Alternatively to Delay Ruling on, Defendants' Cross-Motion for Summary Judgment [Doc. # 82] is DENIED AS MOOT. Judgment in the amount of $1,000 shall enter in favor of Plaintiff. Plaintiff shall submit documentation in support of her claim for attorney's fees, expenses and costs no later than 14 days after entry of Judgment, which will be amended to reflect the Court's award. The Clerk is directed to close this case.

IT IS SO ORDERED.

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15 U.S.C. 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of the judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

[SEAL]
Office of
the Secretary

March 31, 2000

Basil J. Mezines, Esq.
Stein, Mitchell & Mezines, L.L.P.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Mezines:

This is in response to the American Collectors Association's ("ACA's") request for two Commission advisory opinions ("Request") regarding the Fair Debt Collection Practices Act ("FDCPA"), which the association submitted pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.F.R. §§ 1.1-1.4. The two issues will be addressed in the order in which they were presented.

FIRST ISSUE:

Does Section 809(b) of the FDCPA permit a collection agency to either demand payment or take legal action during the pendency of the thirty (30) day period for disputing a debt in situations where a debtor has not notified the collection agency that the debt is disputed?

"[The] starting point in every case involving construction of a statute is the language itself." *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). The language of Section 809(b) provides that, "[i]f the consumer notifies the debt collector in writing within the thirty-day period" that the debt is disputed, the debt collector must cease collection of the debt until verification of the debt is obtained and mailed to the consumer.[1] Where Congress intended that debt collectors cease their collection efforts during the thirty-day dispute period, it so specified: if, and only if, a consumer sends the debt collector a notice in writing. Congress did not specify that collectors must cease collection efforts during the dispute period even if consumers send nothing in writing.

The Commission has voiced this opinion in recent annual reports to Congress mandated by the FDCPA. As the Commission stated in the 1999 report, for

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[1] Section 809(b), 15 U.S.C. § 1692g(b), provides:

> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

example, "Nothing within the language of the statute indicates that Congress intended an absolute bar to any appropriate collection activity or legal action within the thirty-day period where the consumer has not disputed the debt." Letter from Chairman Robert Pitofsky to the Honorable Albert Gore, Jr. regarding Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act, at 10 (Mar. 19, 1999) ("1999 Annual Report"). Because there appears to be some confusion regarding whether the thirty-day period is a dispute period or a grace period, the Commission has recommended in recent annual reports that Congress clarify the FDCPA by adding a provision expressly permitting appropriate collection activity within the thirty-day period, if the debt collector has not received a letter from the consumer disputing the debt. The Commission emphasized that the clarification should include a caveat that the collection activity should not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt specified. 1999 Annual Report at 10-11.[2]

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[2] In the Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097 (1988) ("Staff Commentary"), and staff opinion letters, Commission staff have consistently read Section 809(b) to permit a debt collector to continue to make demands for payment or take legal action within the thirty-day period. See 53 Fed. Reg. at 50,109, comment 809(b)-1 ("A debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he receives a notice from the consumer."); letter from John

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Federal circuit courts that have addressed this issue recently have arrived at the same conclusion. In a 1997 opinion, the Seventh Circuit stated that "[t]he debt collector is perfectly free to sue within the thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor." *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (Posner, J.). In the most recent federal appellate court pronouncement on the subject, the Sixth Circuit stated, "A debt collector does not have to stop its collection efforts [during the thirty-day period] to comply with the Act. Instead, it must ensure that its efforts do not threaten a consumer's right to dispute the validity of his debt." *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999).

The Commission continues to believe that the thirty-day time frame set forth in Section 809 is a *dispute* period within which the consumer may insist that the collector verify the debt, and not a *grace* period within which collection efforts are prohibited. In response to

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F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29, 1997):

> We interpret the "thirty-day period" as a period within which consumers must dispute their debts in writing in order to avail themselves of their Section 809(b) rights, but not as a "grace" period. Thus, we believe that there is nothing in the Act that prevents you from filing suit during this period, so long as you do not make any representations that contradict Section 809(b).

the ACA's question, therefore, the Commission opines that Section 809(b) does permit a collection agency to either demand payment or take legal action during the thirty-day period for disputing a debt when a consumer from whom the collection agency is attempting to collect a debt has not notified the collection agency that the debt is disputed. The collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by Section 809(a).

SECOND ISSUE:

> *Where an attorney debt collector institutes legal proceedings against a debtor but has no prior communications with the debtor, are the requirements for the validation of debts set forth in Section 809 of the FDCPA supreme to state law or state court rules that otherwise prohibit the inclusion of the validation notice on court documents?*

In responding to this issue, the Commission notes first that Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), provides:

> (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Section 803(2) of the FDCPA, 15 U.S.C. § 1692a(2), defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." In its Staff Commentary, Commission staff stated that the term "communication" "does not include formal legal action

(e.g., filing of a lawsuit or other petition/pleadings with a court; service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such service)." 53 Fed. Reg. at 50101, comment 803(2)-2. Similarly, in the introductory portion of the Staff Commentary, Commission staff opined that "[a]ttorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered."[3] *Id.* at 50,100.

Seven years after the Staff Commentary was issued, the United States Supreme Court held that the FDCPA's definition of "debt collector," Section 803(6), 15 U.S.C. § 1692a(6), "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). In arriving at this conclusion, the Court explicitly considered and rejected Commission staff's introductory remark regarding the coverage of litigation attorneys. *Id.* at 298. In light of *Heintz*, the Commission concludes that, if an attorney debt collector serves on a

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[3] The introductory remarks were not part of the Commentary itself. The statement in the Commentary that the quoted remark referred to provided that the term "debt collector" does not include "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)." 53 Fed. Reg. at 50,102, comment 803(6)-2.

consumer a court document "conveying [] information regarding a debt," that court document is a "communication" for purposes of the FDCPA.[4]

If an attorney debt collector has had no prior communications with a consumer before serving a summons or other court document on the consumer, that document would constitute the "initial communication" with the consumer if it conveys information regarding a debt. The attorney would therefore have to include the written notice mandated by Section 809(a) (often referred to as the "validation notice") in the court document itself or send it to the consumer "within five days after the initial communication."

According to the ACA's Request, some "state laws or state court rules [] prohibit the inclusion of additional language such as the validation notice on documents filed with courts." Request at 9. The association asks whether the requirements of Section 809(a) are "supreme to," and thus preempt, these state laws or state court rules. Id. Preemption cases generally proceed from "the starting presumption that Congress does not intend to supplant state

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[4] In an opinion letter issued after the *Heintz* decision, Commission staff opined that "all pleadings must be considered 'communications' if they convey 'information regarding a debt directly or indirectly to any person through any medium.'" Letter from John F. LeFevre, FDCPA Program Advisor, to S. Joshua Berger (May 29, 1997). *See also Mendus v. Morgan & Associates*, 1999 Okla. Civ. App. LEXIS 140, at *19 (Okla. Civ. App. 1999) ("[A] pleading or a summons is a 'communication' under the [FDCPA].).

laws." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).[5] According to the Court in *English v. General Electric Co.*, 496 U.S. 72 (1990):

> [S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude

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[5] This presumption does not apply to all cases. In particular, the Supreme Court recently held that it does not apply to state laws bearing upon national and international maritime commerce. *United States v. Locke*, 120 S. Ct. 1135, 1148 (2000). Locke was apparently based on the relatively large traditional federal role in this area and the relatively small traditional state role, *see id.* at 1147-48, and does not affect the current analysis.

> enforcement of state laws on the same subject.". . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 78-79 (omission in internal quotation in original) (citations omitted).

The preemption provision of the FDCPA, Section 816, 15 U.S.C. § 1692n, provides:

> This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

The Commission does not believe that this section expressly preempts state laws and court rules that prohibit attorney debt collectors from including validation notices in court documents. The quoted

provision makes express that Congress did not intend to preempt the field, but allowed only for conflict preemption. However, there is no conflict preemption here.

First, there is no conflict preemption based on impossibility of compliance because it is possible for attorney debt collectors to comply with both the federal provision and the state provisions.[6] Instead of including such notices in court documents, attorney debt collectors in jurisdictions that prohibit validation notices in court documents may deliver the notices to consumers via some other medium – either before serving the court document on the consumer or, if the court document is truly the first communication with the consumer, within five days of serving the court document.[7]

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[6] *See Codar, Inc. v. Arizona*, No. 94-16902, 1996 U.S. App. LEXIS 21536, at *14-15 (9th Cir. Aug. 19, 1996) (memorandum) (Arizona laws requiring debt collectors to be licensed in the state before they may contact consumers preempted by Section 816 to the extent they prevent unlicenced out-of-state collector from providing Section 809(a) validation notices to Arizona residents who contact such debt collectors to discuss alleged debts; preemption because unlicenced out-of-state collectors that send validation notice would violate state law).

[7] The Request refers to a Commission staff opinion letter which advised that, "[u]nder the principles that the Supreme Court set out in *Heintz v. Jenkins*, law firms that are 'debt collectors' presumably must include Section 809 notices in connection with every summons, if the summons is the first communication with the consumer in connection with the collection of a debt." Letter from Thomas E. Kane to Gordon N.J.

(Continued on following page)

Second, there is no conflict preemption based on state law standing as an obstacle to the full accomplishment and execution of Congressional purposes and objectives. As Congress declared in Section 802(e) of the FDCPA, 15 U.S.C. § 1692(e), the purpose of the panoply of protections under the federal debt collection statute is:

> to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

The state provisions about which you inquire do not prevent consumers from receiving the full panoply of protections from abusive debt collection practices afforded by the FDCPA. The only FDCPA provision that could be affected by these state laws and court rules is Section 809(a). As noted above, an attorney debt collector who is prohibited from including the validation notice in court documents may deliver the

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Kroft (Mar. 8, 1996). While the letter was not binding on the Commission, it does accurately interpret the statute. An attorney debt collector must provide the validation notice "in connection with every summons," if the summons is the first communication with the consumer in connection with the debt. As the Commission notes here, however, the validation notice need not be included in the summons itself. It may be delivered either before or within five days after the summons is served on the consumer.

notice to consumers before serving the consumer with the court document or, if the court document is the first communication with the consumer, within five days after serving the court document. Thus, even in a jurisdiction that prohibits validation notices in court documents, a consumer will receive the validation notice and learn, for example, that the debt collector must provide the consumer with written verification of the debt if the consumer disputes the debt within thirty days. State legislation that prohibits validation notices in court documents also does not stand as an obstacle to the promotion of "consistent State action to protect consumers against debt collection abuses." Consumers will receive their validation notices in jurisdictions that prohibit validation notices in court documents as well as in jurisdictions that permit the practice.

After reviewing state laws and court rules that prohibit validation notices in court documents under a preemption analysis, the Commission concludes that such state legislation is not preempted by the FDCPA.

By direction of the Commission.

Donald S. Clark
Secretary

SUMMONS – CIVIL
(Except Family Actions)
-CV-1 Rev. 1-2000
O.S. § 51-346, 51-347, 51-349, 51-350, 52-45a, 48, 52-259 P B Secs 3-1 thru 3-21, B-1

STATE OF CONNECTICUT
SUPERIOR COURT

www.jud.state.ct.us

"X" ONE OF THE FOLLOWING:
Amount, legal interest or property in demand, exclusive of interest and costs is:

- ☐ less than $2,500
- ☐ $2,500 through $14,999.99
- ☒ $15,000 or more

("X" if applicable)

- ☐ *Claiming other relief in addition to or in lieu of money or damages*

INSTRUCTIONS

Type or print legibly: sign original summons and conform all copies of the summons.
Prepare or photocopy conformed summons for each defendant
Attach the original summons to the original complaint, and attach a copy of the summons to each copy of the complaint. Also, if there are more than 2 plaintiffs or 4 defendants prepare form JD-CV-2 and attach it to the original and all copies of the complaint after service has been made by a proper officer, file original papers and officer's return with the clerk of court.
The party recognized to pay costs must appear personally before the authority taking the recognizance.
Do not use this form for actions in which an attachment, garnishment or replevy is being sought. See Practice Book Section 8-1 or other exceptions.

TO: Any proper officer; BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to make due and legal service of this Summons and attached Complaint.

JUDICIAL DISTRICT HOUSING SESSION ☐ G.A. NO. ___	AT (Town in which writ is returnable) (C.G.S. 51-346, 51-349) STAMFORD-NORWALK	RETURN DATE (Mo., day, yr.) (Must be a Tuesday) 7-19-05	CASE TYPE *(See JD-CV-1c)* Major C Minor 40
ADDRESS OF COURT CLERK WHERE WRIT AND OTHER PAPERS SHALL BE FILED (No., street, town and zip code) (C.G.S. 51-346, 51-350) 3 HOYT STREET, STAMFORD, CT 06905			TELEPHONE NO. (w/area code)

PARTIES	NAME AND ADDRESS OF EACH PARTY *(No., street, town and zip code)*	*NOTE: Individuals' Names: Last, First, Middle Initial*	☐ Form JD-CV-2 attached	PTY NO.
FIRST NAMED PLAINTIFF	CITIBANK (SOUTH DAKOTA), N.A., 7930 NW 110TH STREET, KANSAS CITY, MO 64153			01
Additional Plaintiff				02
FIRST NAMED DEFENDANT	JANET ELLIS, [ADDRESS OMITTED]			50
Additional Defendant				51
Additional Defendant				52
Additional Defendant				53

NOTICE TO EACH DEFENDANT

1. YOU ARE BEING SUED.
2. This paper is a Summons in a lawsuit.
3. The Complaint attached to these papers states the claims that each Plaintiff is making against you in this lawsuit.
4. To respond to this Summons, or to be informed of further proceedings, you or your attorney must file a form called an "Appearance" with the clerk of the above-named Court at the above Court address on or before the second day after the above Return Date.
5. If you or your attorney do not file a written "Appearance" form on time, judgment may be entered against you by default.
6. The "Appearance" form may be obtained at the above Court address.
7. If you believe that you have insurance that may cover the claim that is being made against you in this lawsuit, you should immediately take the Summons and Complaint to your insurance representative.
8. If you have questions about the Summons and Complaint, you should consult an attorney promptly. The Clerk of Court is not permitted to give advice on legal questions.

5/23/05 SIGNED *(Sign and "X" proper box)* ☒ Comm. of Superior Court ☐ Assistant Clerk	TYPE IN NAME OF PERSON SIGNING AT LEFT JULIE S. FARINA

THE PLAINTIFF(S) PLEASE ENTER THE APPEARANCE OF:

NAME AND ADDRESS OF ATTORNEY, LAW FIRM OR PLAINTIFF IF PRO SE (No., street, town and zip code)	TELEPHONE NUMBER	JURIS NO (If atty or law firm)
SOLOMON AND SOLOMON, P.C., 5 COLUMBIA CIRCLE, ALBANY NY 12203	518-456-7200	421261

NAME AND ADDRESS OF PERSON RECOGNIZED TO PROSECUTE IN THE AMOUNT OF $250 (No., street, town and zip code)	SIGNATURE OF PLAINTIFF IF PRO SE
DOUGLAS M. FISHER, SOLOMON & SOLOMON PC, 57 NORTH, 210-211, DANBURY, 06810	

# PLFS.	# DEFS.	# CNTS.	SIGNED *(Official taking recognizance, "X" proper box)*	*For Court Use Only*
	1	1	☒ Comm. of Superior Court ☐ Assistant Clerk	FILE DATE

IF THIS SUMMONS IS SIGNED BY A CLERK
The signing has been done so that the Plaintiff(s) will not be denied access to the courts.
It is the responsibility of the Plaintiff(s) to see that service is made in the manner provided by law.

A TRUE COPY
(ILLEGIBLE)
/s/ Paul Verillo

Return Date:

Docket Number:

CITIBANK (SOUTH DAKOTA) N.A. Plaintiff	SUPERIOR COURT STAMFORD-NORWALK JUDICIAL DISTRICT 05/19/05
JANET ELLIS Defendant	

COMPLAINT

1. Plaintiff is A NATIONAL BANKING ASSOCIATION.

2. Defendant(s) reside at: [Address Omitted]

3. That the Defendant(s) was extended credit.

4. Defendant(s) failed to make payments for the credit extended. The total balance due is $17809.13

5. That heretofore, Plaintiff rendered to Defendant(s) monthly, full and true accounts of the indebtedness owing by the Defendant(s) as a result of the credit extended, in an amount as hereinabove set forth which account statements were delivered to and accepted without objection by the Defendant(s) resulting in an account stated for the amount set forth above.

WHEREFORE, Plaintiff prays for the following relief:

1. Money damages pursuant to the account stated $17809.13

2. Costs and disbursements.

3. Such other and further relief as the Court may deem just and equitable.

CITIBANK
(SOUTH DAKOTA) N.A.

by its attorney,

/s/ Julie S. Farina

Julie S. Farina
Solomon and Solomon, P.C.
5 Columbia Circle
Albany, NY 12203
Juris No 421261
(518) 456-7200

This is an attempt to collect a debt. Any information obtained will be used for that purpose. This communication is from a debt collector.